NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EARL DAVID DRAKE, Petitioner - Appellant, v. **LARRY SMALL; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; MIKE KNOWLES**, Respondents - Appellees.	No. 05-15778 D.C. No. CV-00-01156-LKK/JFM **MEMORANDUM**[*]

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Argued and Submitted May 16, 2006
San Francisco, California

Before: **KOZINSKI** and **FISHER**, Circuit Judges, and **BLOCK**,[**] Senior District Judge.

[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

[**] The Honorable Frederic Block, Senior United States District Judge for the Eastern District of New York, sitting by designation.

1. In his state habeas proceedings, Drake argued that the statements he made while in police custody were "involuntary" and "coerced." Nowhere did he allege, however, that the police erred in questioning him without giving him Miranda warnings, nor did he present any legal arguments based on Miranda v. Arizona, 384 U.S. 436 (1966). He thus failed to exhaust his Miranda claim. See 28 U.S.C. § 2254(b)(1)(A).

Drake also failed to present such a Miranda argument before the district court. He may not raise a Miranda claim for the first time on appeal. See United States v. Robertson, 52 F.3d 789, 791 (9th Cir. 1995).

2. Regarding the evidence of Drake's prior conduct, the jury was properly instructed as follows:

> You may not convict the defendant solely because you believe that he committed another offense or offenses or solely because you believe that he has a character trait that tends to predispose him to committing the charged offenses. . . . You may return a verdict of guilty only if you are convinced beyond a reasonable doubt that the defendant committed the offenses charged against him in this case.

In cases where similar instructions were held to be unconstitutional, the jury was told it "may . . . infer [based solely on the defendant's prior conduct] that he was likely to commit and did commit the crime or crimes of which he is accused." Gibson v. Ortiz, 387 F.3d 812, 822 (9th Cir. 2004); see also People v. Orellano, 93

Cal. Rptr. 2d 866, 868 (Ct. App. 2000); People v. Vichroy, 90 Cal. Rptr. 2d 105, 109 (Ct. App. 1999). The jury was not so instructed here. Thus, the jury instructions did not lower the prosecution's burden of proof as to the "fact[s] necessary to constitute the crime[s] with which he [was] charged." In re Winship, 397 U.S. 358, 364 (1970) (emphasis added). Overall, the jury instructions were neither "contrary to," nor "an unreasonable application of," any Supreme Court precedent. 28 U.S.C. § 2254(d)(1).

3. Drake's trial attorney objected, in writing, to the admission of Drake's prior conduct on the ground that it would be more prejudicial than probative. His argument, though unsuccessful, did not fall "below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 688 (1984). Thus, Drake's ineffective assistance of counsel claim must fail.

AFFIRMED.